IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Tamara Vance Plaintiff, v. Bureau of Collection Recovery LLC Defendant,	)))))))))	 NO: 10 CV 06324 Judge Robert Dow

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant, BUREAU OF COLLECTION RECOVERY LLC, by and through its undersigned counsel, submits the following reply in support of its FRCP 12(b)(6) Motion to Dismiss:

I. The Complaint Fails to Set Forth Any Facts to Suggest that Defendant Called Plaintiff With "Equipment Which Has The Capacity (A) To Store Or Produce Telephone Numbers To Be Called, Using A Random Or Sequential Number Generator; And (B) To Dial Such Numbers"

1. Plaintiff alleges that Defendant violated of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") by placing "automated" calls to her cellular telephone without her permission. *See* Complaint, attached to Motion to Dismiss as Exhibit A, ¶¶1-2, 10-11.

2. The TCPA specifically defines an "automatic telephone dialing system" as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." § 227(a)(1)(A)-(B).

3. Nowhere in the Complaint does Plaintiff allege that Defendant called her with equipment that meets the above statutory definition.

4. Given the TCPA's fact specific definition, it is not enough for Plaintiff to allege upon "information and belief," that "the calls were placed using predictive dialers." Complaint

at ¶¶10-11. Plaintiff's Response argues that she can assert facts upon information and belief because this case does not involve allegations of fraud. Response, pp. 4-5.

5. While it is true that allegations upon information and belief are more generally frowned upon in fraud claims unless a plaintiff can assert why it does not know all of the necessary facts, *see, e.g., Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 924 (7th Cir.1992), it is axiomatic that a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, --- U.S. ----, 129 S.Ct. 1937, 1949 (2009). Applying this standard, Plaintiff has failed to assert any allegations which make it *plausible* that *Defendant's telephone dialing equipment* "has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

6. Plaintiff's reference to Defendant's website in paragraph 8 of the Complaint misses the mark because nothing on the websites discusses the "capacity" of the identified dialing systems. As such, Plaintiff's allegations do not go "above the speculative level." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007).

7. Finally, the fact that Plaintiff alleges in paragraph 12 of the Complaint that she "knew that the calls were automated because there was a prerecorded voice that answered and told her to hold for assistance" does not support the notion that *Defendant's telephone dialing equipment* "has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

8. Additionally, allegations on information and belief are arguably inappropriate in the context of a class action where it is not unreasonable for a defendant to suggest that class actions are often filed to cause Defendants to pay large settlements to avoid the cost of defending

class-based discovery. *Twombly*, 550 U.S. at 546, 558. *See also, Asahi Glass Co. v. Pentech Pharmaceuticals, Inc*., 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

II. Section II of Plaintiff's Response Has Misinterpreted Defendant's Argument

9. Plaintiff argues that "Defendant asserts that predictive dialing is not regulated by the TCPA because the statute itself does not specifically mention 'predictive dialer' by name." Response, p. 3. That is not what Defendant is arguing. Defendant is simply arguing that Plaintiff cannot state a cause of action unless she alleges a proper factual basis to plausibly suggest that Defendant's telephone dialing equipment "has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

10. Defendant is not asking this Court to disregard any FCC Order. Rather, it is simply asking this Court to require Plaintiff to allege that Defendant's dialer meets the TCPA's statutory definition as defined by § 227(a)(1)(A)-(B).

III. Plaintiff Has Neglected to Address Defendant's Argument That She Failed to Alleged That Defendant Dialed Her Number

11. In numerous TCPA cases, various class representatives have asserted that they were called in violation of the TCPA where discovery has uncovered that they did not own the phone in question. For example, cases have been brought by plaintiffs who were called in relation to a debt they incurred but the cell phone was owned and paid for by another person. Here, it is not clear whether Plaintiff was the subscriber or owner of the cell phone number in question. Before launching into expensive class based discovery, Plaintiff should be required to

WHEREFORE, for the reasons set forth above, Defendant BUREAU OF COLLECTION RECOVERY LLC respectfully requests that this Honorable Court dismiss Plaintiff's Complaint.

By: s/ James C. Vlahakis
One of the Attorneys for Defendant BUREAU OF COLLECTION RECOVERY LLC

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2011 I electronically filed **Defendant's Reply in Support of its Motion to Dismiss** with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to all counsel of record.

	By: s/ James C. Vlahakis One of the Attorneys for Defendant BUREAU OF COLLECTION RECOVERY LLC